

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:04-CR-167-BO

No. 5:16-CV-378-BO

MALCOLM JERMAINE CARRY,)	
)	
Petitioner,)	
)	
v.)	<u>UNOPPOSED MOTION TO</u>
)	<u>PLACE IN ABEYANCE</u>
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

Respondent, by and through the United States Attorney for the Eastern District of North Carolina, hereby moves the Court to hold this matter in abeyance pending the oral arguments and subsequent decisions of the Fourth Circuit Court of Appeals in United States v. Walker, No. 15-4301 (4th Cir. 2016), and United States v. Simms, No. 15-4640 (4th Cir. 2016), both of which are scheduled to be heard in September or October of this year. In support of this motion, Respondent shows unto the Court the following:

1. On or about June 13, 2016, Petitioner filed the instant motion pursuant to 28 U.S.C. § 2255. [D.E. 221]. Petitioner alleges that Hobbs Act robbery is not a crime of violence for purposes of 18 U.S.C. § 924(c) in light of Johnson v. United States, 135 S. Ct. 2551 (2015).

2. As this Court is aware, in Johnson, 135 S. Ct. at 2557, the Supreme Court struck as unconstitutionally vague the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B).

3. At issue here is whether the holding in Johnson extends to the residual clause found in § 924(c)(3)(B). This issue will potentially be addressed by the Fourth Circuit in two cases currently scheduled for oral argument in September/October of 2016: United States v. Walker, No. 15-4301 (4th Cir. 2016), and United States v. Simms, No. 15-4640 (4th Cir. 2016). Accordingly, the decisions in those cases may have a significant impact on the resolution of Petitioner's § 2255 motion.

4. Respondent therefore requests that this Court hold Petitioner's § 2255 motion in abeyance until the Fourth Circuit decides the aforementioned cases.

5. Counsel for Petitioner does not object to this motion.

WHEREFORE, Respondent respectfully requests that the Court hold this matter in abeyance pending the Fourth Circuit's decisions in Walker and Simms.

Respectfully submitted, this 15th day of July, 2016.

JOHN STUART BRUCE
Acting United States Attorney

BY: /s/ Donald R. Pender
DONALD R. PENDER
Attorney for Respondent
Assistant United States Attorney
Appellate Division
310 New Bern Avenue
Suite 800 Federal Building
Raleigh, NC 27601-1461
Telephone: (919) 856-4897
Facsimile: (919) 856-4821
Email: donald.pender@usdoj.gov
N.C. Bar # 48004

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2016, I served a copy of the foregoing upon the following persons:

Sherri R. Alspaugh
Assistant Federal Public Defender
Counsel for Petitioner
(Via ECF)

/s/ Donald R. Pender
DONALD R. PENDER
Assistant United States Attorney